

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA WETHY,

Plaintiff-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 242700
WCAC
LC No. 01-000365

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by leave granted the June 19, 2002 order of the Worker's Compensation Appellate Commission (WCAC) which affirmed on different grounds the magistrate's award of benefits. Defendant claims that the WCAC erred in calculating plaintiff's average weekly wage. We find defendant's claim unpersuasive and affirm the WCAC's order.

The WCAC must review the magistrate's decision under the "substantial evidence" standard. This Court will then review the WCAC's decision under the "any evidence" standard. *Mudel v Great A & P Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000). We begin our review with the decision of the WCAC, not the decision of the magistrate. *Id.* at 709. If there is any evidence supporting the WCAC's factual findings and if the WCAC did not misapprehend its administrative role in reviewing the magistrate's decisions, then the court must treat the WCAC's factual findings as conclusive. *Id.* at 709-710. A decision of the WCAC is subject to reversal only if it is based on erroneous legal reasoning or the wrong legal framework. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401-402; 605 NW2d 300 (2000).

The material facts of this case are not in dispute. Plaintiff began working for defendant General Motors (GM) at a plant in Grand Rapids in 1977. On August 30, 1998, GM sold the Grand Rapids' plant to Lear Corporation. Plaintiff was instructed that to remain a GM employee, she must request a transfer before October 1, 1998. Plaintiff timely requested a transfer.

Despite the sale, plaintiff continued to work at the same Grand Rapids' plant until February 23, 1999, when her request for a transfer was granted, and she was transferred to a GM plant in Lansing. In August 1999, plaintiff fell and was injured while working at the Lansing plant.

Defendant voluntarily paid benefits to plaintiff. However, plaintiff instituted the instant proceedings, because she believed that defendant was paying benefits at an incorrect rate. Plaintiff contended that the rate (“average weekly wage”) defendant used was wrong because it did not reflect plaintiff’s earnings between the August 1998 sale of the Grand Rapids’ plant to Lear and plaintiff’s February 1999 transfer to the GM plant in Lansing. Defendant responded that the wages plaintiff earned between the sale of the plant and her transfer to Lansing should not be considered because she earned those wages while working for a different employer, i.e. Lear.

In the proceedings below, the parties stipulated to all issues except the proper calculation of the average weekly wage. However, the parties did stipulate that plaintiff’s average weekly wage if based solely on her wages since the transfer to Lansing was \$844.31, and that her average weekly wage if her wages earned while working at the Grand Rapids plant after the sale were included in the calculation was \$1340.15.

Plaintiff testified at the hearing that between the time of the sale of the Grand Rapids plant to Lear and her transfer to the Lansing plant, her benefits, such as life and health insurance, did not change, that her insurance card read “General Motors,” that she was able to purchase a GM vehicle at an employee discount, and that she accumulated GM employee service credit and vacation time. She also testified that after her transfer to the Lansing plant, she requested an audit of her service time, and that the audit included the time between August 1998 and February 1999.

The magistrate concluded that the wages plaintiff earned while working at the Grand Rapids plant after the sale of the plant to Lear should be considered in calculating plaintiff’s average weekly wage. In support of this conclusion, the magistrate relied upon the language of subsection (6) of MCL 418.371, which states that the average weekly wage is calculated by “dividing the aggregate earnings during the year before the injury by the number of days when work was performed and multiplying that daily wage by the number of working days customary in the employment but not less than 5.” The magistrate concluded that because subsection (6) did not specify that the “aggregate earnings” must be from the employer which employed plaintiff at the time the injury occurred, it did not matter whether plaintiff was an employee of Lear or GM during the year before her injury.

Defendant appealed the magistrate’s decision to the WCAC. Defendant claimed that the magistrate improperly calculated the average weekly wage. Defendant argued that the subsection (3) of MCL 418.371 controls, not subsection (6). Defendant contended that subsection (3) applies where an employee has not worked for an employer for more than 39 of the 52 weeks preceding the injury, and that in this case, because plaintiff worked for Lear between August 1998 and February 1999, plaintiff’s employment with defendant in the year before her injury was less than 39 weeks (i.e., 27 weeks).

The WCAC disagreed with defendant’s argument, stating that although the Grand Rapids’ plant where plaintiff worked was sold to Lear, the evidence indicated that plaintiff was,

in fact, a GM employee without a break in service. As a result, the WCAC found that plaintiff had worked for GM for more than 39 of the 52 weeks preceding the injury; therefore, that subsection (3) did not apply. The WCAC disagreed, however, with the magistrate's application of subsection (6) and concluded that the average weekly wage should be calculated using subsection (2). Therefore, the WCAC affirmed the magistrate's decision, but modified it to reflect the application of subsection (2) rather than subsection (6).

In this appeal, GM claims as it did below, that plaintiff's average weekly wage should be calculated under subsection (3) because plaintiff did not work for defendant for more than 39 of the 52 weeks preceding her injury. We disagree.

The WCAC must review the magistrate's decision under the "substantial evidence" standard, while this Court will review the WCAC's decision under the "any evidence" standard. *Mudel v Great A & P Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000). This Court's review begins with the decision of the WCAC. *Id.* at 709. If there is *any* evidence supporting the WCAC's factual findings and if the WCAC did not misapprehend its administrative role in reviewing the magistrate's decisions, we must treat the WCAC's factual findings as conclusive. *Id.* at 709-710. We will reverse a decision of the WCAC only if it is based on erroneous legal reasoning or the wrong legal framework. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401-402; 605 NW2d 300 (2000).

At issue in this case is the application of MCL 418.371, which governs the calculation of an "average weekly wage." The WCAC concluded that subsection (2) governs; defendant contends that subsection (3) governs.

Subsection (2) states that "[t]he average weekly wage shall be determined by computing the total wages paid in the highest paid 39 weeks of the 52 weeks immediately preceding the date of injury, and dividing by 39." However, subsection (3) states:

If the employee worked less than 39 weeks in the employment in which the employee was injured, the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked. For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

In support of its claim that subsection (3) applies, defendant focuses on the language that the relevant consideration is the number of "weeks actually worked" and the "weeks in which work is performed." Defendant argues that in this case, although the emoluments of employment with defendant continued for plaintiff after the sale of the Grand Rapids plant to Lear, plaintiff did not actually work for defendant. Instead, plaintiff worked for Lear from August 1998 to February 1999, and that period of employment and the wages she earned during that period should not be considered. When that period of employment is disregarded, plaintiff worked fewer than 39 of the 52 weeks before her injury for GM.

Defendant's position is contrary to precedent. In *Montano v General Motors Corp*, 187 Mich App 230; 466 NW2d 707 (1991), the plaintiff worked for the defendant full-time from 1966 to 1980, but only intermittently (fewer than 39 weeks) in the 52 weeks preceding his injury. This Court found the application of subsection (3) to have been improper, stating:

We believe the clear and unambiguous meaning of subsection (3) refers to a situation where an employee has not yet worked thirty-nine weeks at the place of employment where he was injured. Moreover, we reject plaintiff's contention that the board properly applied subsection (3) to the present situation. Although plaintiff had not worked more than thirty-nine weeks for defendant in the year preceding his injury, he clearly had worked for defendant more than thirty-nine weeks at the time of his injury. Since subsection (3) applies only to employees who have not yet worked thirty-nine weeks for their employer at the time they are injured, subsection (3) is inapplicable to the present situation. [*Id.* at 236.]

Under *Montano*, whether the employee worked for the employer during at least 39 of the 52 weeks preceding the injury is not the issue; the issue is whether the employee worked for the employer for more than thirty nine weeks during the course of the entire employment relationship. In the case at bar, as in *Montano*, because plaintiff at the time of her injury had worked for more than 39 weeks during the course of her employment relationship with defendant, subsection (3) is inapplicable. As a result, defendant's claim must fail.

Defendant acknowledges *Montano*, but argues that the decision should not apply. Defendant contends: (1) that *Montano* was wrongly decided; (2) that the discussion was dicta; and (3) that the decision has been superseded. We find these contentions unpersuasive.

First, this Court has specifically noted that *Montano's* holding in regard to the interpretation of subsection (3), whether correct or not, is binding. See *Toth v AutoAlliance International Inc*, 246 Mich App 732, 738 n 3; 635 NW2d 62 (2001). Therefore, defendant's first two contentions must fail.

Further, we do not agree that *Montano* has been superseded by the Supreme Court's decision in *Rowell v Security Steel Co*, 445 Mich 347; 518 NW2d 409 (1994). *Rowell* did interpret subsection (3); however, its interpretation was limited to determining the proper treatment of partially worked weeks of hiring and injury in calculating the average weekly wage. The question of whether subsection (3) should apply was not at issue in *Rowell*, and we find nothing in the decision which calls *Montano* into question.

In light of *Montano*, defendant's claim that subsection (3) applies is without merit.¹

We affirm.

/s/ Jane E. Markey

/s/ Henry William Saad

I concur in result only.

/s/ Kurtis T. Wilder

¹ The issue before the Court in this appeal is simply whether subsection (3) applies. In light of this limited issue, and the fact that the magistrate's calculation of average weekly wage was the same as the WCAC's, we see no need to determine whether subsection (2) or subsection (6) applies.